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No. 87-1267

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

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RALPH R. MABEY, EXAMINER OF
A.H. ROBINS COMPANY, INCORPORATED,
*Petitioner*

v.

THE OFFICIAL COMMITTEE OF EQUITY SECURITY HOLDERS OF A.H. ROBINS COMPANY, INCORPORATED; A.H. ROBINS COMPANY, INCORPORATED; DALKON SHIELD CLAIMANTS' COMMITTEE OF A.H. ROBINS COMPANY, INCORPORATED; AND LEGAL REPRESENTATIVE OF FUTURE TORT CLAIMANTS OF A.H. ROBINS COMPANY, INCORPORATED,
*Respondents*

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**On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit**

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## MEMORANDUM SUPPORTING CERTIORARI

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The Dalkon Shield Claimants' Committee, one of the respondents herein, respectfully urges the Court to grant the petition for a writ of certiorari requested by Ralph R. Mabey, the Examiner of A.H. Robins Company, Incorporated.

## STATEMENT OF THE CASE

The Official Dalkon Shield Claimants' Committee represents in this Chapter 11 Bankruptcy Case all persons who hold claims against A.H. Robins Company, Incor-

porated ("Robins") for injuries caused by one of Robins' products—the Dalkon Shield. The Dalkon Shield, an intrauterine birth control device, injured thousands of the women who used it. Prior to filing its bankruptcy petition, Robins resolved approximately 9,000 Dalkon Shield claims for approximately $500,000. There are roughly 200,000 Dalkon Shield claims pending in the bankruptcy case. The Court has estimated the value of these claims to be $2.475 billion. To date, the Court has not confirmed a plan of reorganization, and the claimants remain uncompensated for their Dalkon Shield-related injuries.

The length of this bankruptcy case has been particularly damaging to a group of women rendered infertile by the Dalkon Shield. Persons in this group might yet bear children if they could afford tubal reconstructive surgery or *in vitro* fertilization. Time is of the essence. Every day these women grow older, the probability that surgery or *in vitro* fertilization will succeed diminishes. As they approach the age of forty, they may become ineligible even to try the procedures which might reverse infertility. Thus, as the case drags on, the number of women prevented from bearing children increases and Robins' liability grows larger.

In order to provide prompt treatment for those infertile women to whom time is so critical, the Dalkon Shield Claimants' Committee, the Examiner, the Legal Representative of Future Tort Claimants and the Debtor jointly sought approval of a $15 million emergency fund to pay on an expedited basis for reconstructive surgery or *in vitro* fertilization. The Official Committee of Equity Security Holders opposed the fund. As described in greater detail in the Examiner's Petition for Certiorari at pages 5-8, the District Court approved the establishment of the emergency fund. The Official Committee of Equity Security Holders appealed, and the Court of Appeals for the Fourth Circuit reversed. The Examiner's

Petition for Certiorari asks this Court to review the Court of Appeals' decision.

## REASON FOR GRANTING CERTIORARI

### THE COURT SHOULD GRANT CERTIORARI TO DETERMINE THE IMPORTANT FEDERAL QUESTION OF WHETHER THE BANKRUPTCY CODE PERMITS A DEBTOR TO DISBURSE FUNDS WHICH WILL BE USED TO MITIGATE DAMAGES FOR INJURIES WHICH IT CAUSED BEFORE ITS BANKRUPTCY

If allowed to stand, the Court of Appeals' interpretation of the Bankruptcy Code in this case could significantly hamper the reorganization of companies with liabilities such as those of Robins. The restrictive approach taken by the Court of Appeals leads to a result that undermines the goals of the Bankruptcy Code. The Court of Appeals' ruling does not preserve funds of the estate. Rather, the ruling insures that the total amount necessary to pay Dalkon Shield claimants will be more than if the emergency fund program had been implemented. As more women reach the age at which they can no longer reverse their infertility, Robins' liability for damages increases.[1] Thus, the emergency fund not only would prevent a tragic—and irreversible—loss for a group of former Dalkon Shield users, but would also leave more money to be distributed to other creditors and shareholders.

The Court of Appeals read one principle of the Bankruptcy Code, requiring plan confirmation before distributions to unsecured creditors, as precluding any and all efforts to further other equally important policies of the Code. A Bankruptcy Court is, above all, empowered to

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[1] As discussed more fully in the Examiner's Petition for Certiorari at page 6, studies conducted by court-appointed experts show that, prior to the bankruptcy, Robins paid Dalkon Shield claims for infertility $32,000-$35,000 more than claims involving less serious injuries.

protect the assets of the estate and the interests of all parties. It is simply unthinkable that where, as here, a debtor can take steps which would promote the interests of all parties, the Code prevents the steps from being taken.

The Court of Appeals' narrow reading of Chapter 11 results in a precedent that creates an unnecessary tension between various policies of the Bankruptcy Code. Lower courts need guidance from this Court as to whether the Bankruptcy Code allows a debtor to disburse funds before a plan is approved if that will reduce the claims the debtor must ultimately pay.

## CONCLUSION

For the foregoing reasons, and those contained in the Examiner's Petition for Writ of Certiorari, the Petition should be granted.

Respectfully submitted,

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